

**U.S. District Court  
Northern District of Ohio (Cleveland)  
CIVIL DOCKET FOR CASE #: 1:10-cv-01370-PAG  
Internal Use Only**

Progressive Casualty Insurance Company v. Safeco  
Insurance Company of Illinois et al  
Assigned to: Judge Patricia A. Gaughan  
Cause: 35:271 Patent Infringement

Date Filed: 06/18/2010  
Date Terminated: 11/12/2010  
Jury Demand: Plaintiff  
Nature of Suit: 830 Patent  
Jurisdiction: Federal Question

**Plaintiff**

**Progressive Casualty Insurance  
Company**




Pct. \* 6,064,970

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		Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # <u>1</u> Affidavit of James R. Myers)(Cipolla, John) (Entered: 07/30/2010)
07/30/2010	29	<b>Motion</b> for attorney Nicole M. Jantzi to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-4212251, filed by Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Corporation, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # <u>1</u> Affidavit of Nicole M. Jantzi)(Cipolla, John) (Entered: 07/30/2010)
08/02/2010		(Court only) Staff Note Regarding Pro Hac Vice Motion from attorney James R. Myers. The attorney's bar status was verified active. Related document(s) <u>28</u> . (G.C.A) (Entered: 08/02/2010)
08/02/2010		(Court only) Staff Note Regarding Pro Hac Vice Motion from attorney Nicole M. Jantzi. The attorney's bar status was verified active. Related document(s) <u>29</u> . (G.C.A) (Entered: 08/02/2010)
08/03/2010		<b>Order</b> [non-document]Defendants' Motion to Reschedule Date of Case Management Conference is GRANTED to 9/28/10 at 9:00 a.m. in Chambers 19B before Judge Patricia A. Gaughan. <u>24</u> Approved by Judge Patricia A. Gaughan on 8/02/10.(D,MB) (Entered: 08/03/2010)
08/03/2010		<b>Order</b> [non-document]Defendants' Unopposed Motion to Permit Counsel to Appear in Person at the Case Management Conference is GRANTED. <u>25</u> Approved by Judge Patricia A. Gaughan on 8/02/10.(D,MB) (Entered: 08/03/2010)
08/03/2010		<b>Order</b> [non-document]Defendants' Motion to Extend Time to File Responsive Pleadings is GRANTED to 9/08/10. <u>26</u> Approved by Judge Patricia A. Gaughan on 8/02/10.(D,MB) (Entered: 08/03/2010)
08/04/2010	<u>30</u>	<b>Marginal Entry Order</b> granting Motion for appearance pro hac vice by James R. Myers (Related Doc # <u>28</u> ). Signed by Judge Gaughan on 8/2/10 (C,KA) (Entered: 08/04/2010)
08/04/2010	<u>31</u>	<b>Marginal Entry Order</b> granting Motion for appearance pro hac vice by Nicole M. Jantzi (Related Doc # <u>29</u> ). Signed by Judge Gaughan on 8/2/10 (C,KA) (Entered: 08/04/2010)
08/04/2010		(Court only) Utility Event adding attorneys James R. Myers,Nicole M. Jantzi for defendants(C,KA) (Entered: 08/04/2010)
08/10/2010		<b>Order</b> [non-document] granting Motion for appearance pro hac vice by Charles M. McMahon. Judge Patricia A. Gaughan on 8/2/10. (Related Doc # <u>21</u> ) (LC,S) (Entered: 08/10/2010)
09/08/2010	32	<b>Motion</b> to dismiss <i>for Failure to State a Claim Upon Which Relief May Be Granted</i> filed by Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Corporation, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # <u>1</u> Brief in

		Support, # 2 Exhibit A - US Patent No. 6,064,970, # 3 Exhibit B - Case Law (Ultramercial v. Hulu), # 4 Exhibit C - Case Law (Graff v. Federal Home Loan), # 5 Exhibit D - USPTO Memorandum re Bilski, # 6 Exhibit E - Interim Guidance after Bilski, # 7 Exhibit F - MPEP 2100 - Patentability)(Cipolla, John) (Entered: 09/08/2010)
09/08/2010	<u>33</u>	Corporate Disclosure Statement filed by Liberty Mutual Group Inc.. (Cipolla, John) (Entered: 09/08/2010)
09/08/2010	<u>34</u>	Corporate Disclosure Statement filed by Liberty Mutual Insurance Company. (Cipolla, John) (Entered: 09/08/2010)
09/08/2010	<u>35</u>	Corporate Disclosure Statement filed by Safeco Corporation. (Cipolla, John) (Entered: 09/08/2010)
09/08/2010	<u>36</u>	Corporate Disclosure Statement filed by Safeco Insurance Company of America. (Cipolla, John) (Entered: 09/08/2010)
09/08/2010	<u>37</u>	Corporate Disclosure Statement filed by Safeco Insurance Company of Illinois. (Cipolla, John) (Entered: 09/08/2010)
09/08/2010	<u>38</u>	Corporate Disclosure Statement filed by Open Seas Solutions, Inc.. (Cipolla, John) (Entered: 09/08/2010)
09/08/2010	<u>39</u>	Corporate Disclosure Statement filed by The Ohio Casualty Insurance Company. (Cipolla, John) (Entered: 09/08/2010)
09/15/2010	<u>40</u>	Joint Notice <i>In Compliance With Local Patent Rule 1.5</i> filed by All Parties. (Wooley, James) (Entered: 09/15/2010)
09/23/2010	<u>41</u>	Joint Report of Parties' Planning Meeting , parties do not consent to this case being assigned to the magistrate judge, filed by All Parties. (Attachments: # <u>1</u> Exhibit A - Schedule)(Wooley, James) (Entered: 09/23/2010)
09/28/2010	<u>42</u>	<b>Case Managment Order:</b> Case Management Conference was held on 9/28/10. Case is assigned to the complex track. Case is suitable for ECF. Case is not suitable for ADR at this time but may be after discovery. Schedule through Claim Construction- 10/11/10 Progressive's Opposition to Rule 12(b)(6) Motion; 10/25/10 Safeco's Reply; 11/15/10 Infringement Contentions; 12/01/01 Responses to written discovery served prior to 9/30/10 and 26(a)(1) disclosures; 12/15/10 Non-infringement Contentions; 1/19/11 Invalidity and Unenforceability Contentions; 2/03/11 Preliminary ID of Claim Terms to be Construed; 2/08/11 Validity and Enforceability Contentions; 2/23/11 Final ID of Claim Terms; 3/10/11 Preliminary Claim Constructions and Supporting Materials; 3/25/11 ID of Claim Construction Expert; 4/11/11 Disclosure of Rebuttal Claim Construction Expert; 4/26/11 Completion of Expert Discovery (Cl. Constr.); 5/02/11 Final Claim Construction; 5/17/11 Opening Claim Construction Submission; 6/16/11 Responsive Claim Construction Submissions; 6/21/11 File Joint Claim Construction and Prehearing Statement. A Status Conference by phone is set 1/11/2011 at 09:00 AM. Judge Patricia A. Gaughan on 9/28/10. (L.C.S) Time: 1 hr. (Entered: 09/29/2010)

10/12/2010	43	<b>Opposition to 32 Motion</b> to dismiss <i>for Failure to State a Claim Upon Which Relief May Be Granted</i> filed by Progressive Casualty Insurance Company. (Attachments: # 1 Exhibit Ex. A - Deston Decision, # 2 Exhibit Ex. B - Bill of Lading Decision, # 3 Exhibit Ex. C - Yangaroo Decision, # 4 Exhibit Ex. D - Bird Barrier Decision, # 5 Exhibit Ed. E - Cima Decision, # 6 Exhibit Ex. F - Rombach Decision)(McMahon, Charles) (Entered: 10/12/2010)
10/14/2010	44	<b>Motion to stay Litigation Pending Ex Parte Reexamination of the Patent-in-Suit by the United States PTO</b> filed by Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Corporation, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # 1 Brief in Support of Defendants' Motion To Stay Litigation Pending Ex Parte Reexamination of the Patent-in-Suit by the United States PTO, # 2 Affidavit DECLARATION of Joseph Cipriano, AVP and Senior Corporate Counsel, # 3 Affidavit DECLARATION of Karim Z. Oussayef, Esq., of Ropes & Gray LLP, # 4 Exhibit A - 11/12/99 Examiner Interview Summary, # 5 Exhibit B - Ex Parte Reexamination Filing Data, # 6 Exhibit C - MPEP, # 7 Exhibit D - 11/16/07 Letter Richard Hutchinson to Michael H. Hughes, # 8 Exhibit E - 12/26/07 Letter Scott E. Schrum to R. Hutchinson, # 9 Exhibit F - 11/28/08 Letter Charles E. Jarrett to Christopher C. Mansfield, # 10 Exhibit G - 12/12/08 Letter Edmund Kenealy to C. Jarrett, # 11 Exhibit H - 1/13/09 Letter E. Kenealy to C. Jarrett, # 12 Exhibit I - 1/23/09 Letter C. Jarrett to E. Kenealy, # 13 Exhibit J - Reexamination Request, # 14 Exhibit K - Reexamination Transaction History, # 15 Exhibit L - PTO Pilot Program, # 16 Exhibit M - U.S. Patent No. 6,064,970, # 17 Exhibit N - 7/19/99 Amendment, # 18 Exhibit O - 9/29/10 - Letter N. Jantzi to L. Miller, # 19 Exhibit P - Kosaka Reference, # 20 Exhibit Q - Dorweiler Reference, # 21 Exhibit R - Pettersen Reference, # 22 Exhibit S - 11/18/99 Amendment)(Cipolla, John) (Entered: 10/14/2010)
10/26/2010	45	<b>Reply to response to 32 Motion</b> to dismiss <i>for Failure to State a Claim Upon Which Relief May Be Granted</i> filed by All Defendants. (Cipolla, John) (Entered: 10/26/2010)
10/28/2010	46	<b>Opposition to 44 Motion</b> to stay <i>Litigation Pending Ex Parte Reexamination of the Patent-in-Suit by the United States PTO</i> filed by All Plaintiffs. (Attachments: # 1 Affidavit of Charles M. McMahon, # 2 Exhibit 1 - Pages from Progressive website, # 3 Exhibit 2 - Pages from Progressive website, # 4 Exhibit 3 - Reexamination Filing Data (6/30/06), # 5 Exhibit 4 - Reexamination Filing Data (12/31/07), # 6 Exhibit 5 - Reexamination Filing Data (3/31/09), # 7 Exhibit 6 - Reexamination Filing Data (12/31/09), # 8 Exhibit 7 - U.S. Pat. No. 6,868,386, # 9 Exhibit 8 - Magna Carta Holdings (slip op.), # 10 Exhibit 9 - Adaptor, Inc. (slip op.), # 11 Exhibit 10 - MPEP Excerpts)(McMahon, Charles) (Entered: 10/28/2010)
11/04/2010	47	<b>Reply to response to 44 Motion</b> to stay <i>Litigation Pending Ex Parte Reexamination of the Patent-in-Suit by the United States PTO</i> filed by All

		Defendants. (Cipolla, John) (Entered: 11/04/2010)
11/12/2010	<u>48</u>	<b>Memorandum Opinion and Order:</b> Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted is DENIED. Judge Patricia A. Gaughan on 11/12/10. (LC,S) (Entered: 11/12/2010)
11/12/2010	<u>49</u>	<b>Memorandum Opinion and Order:</b> Defendants' Motion to Stay Litigation Pending Ex Parte Reexamination of the Patent-In-Suit by the United States PTO is GRANTED. This case will be closed, but reopened upon immediate notification of either party after the conclusion of the reexamination process. Judge Patricia A. Gaughan on 11/12/10. (LC,S) re 44 , 48 . (Entered: 11/12/2010)
11/12/2010		(Court only) Termination of case. (LC,S) (Entered: 11/12/2010)

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

PROGRESSIVE CASUALTY INSURANCE  
COMPANY,

Plaintiff,

v.

SAFECO INSURANCE COMPANY OF  
ILLINOIS, SAFECO INSURANCE  
COMPANY OF AMERICA, SAFECO  
CORPORATION, LIBERTY MUTUAL  
INSURANCE COMPANY, LIBERTY  
MUTUAL GROUP INC., THE OHIO  
CASUALTY INSURANCE COMPANY, and  
OPEN SEAS SOLUTIONS, INC.,

Defendants.

Case No.

JURY DEMAND

**COMPLAINT**

Plaintiff Progressive Casualty Insurance Company ("Progressive"), by and through its attorneys, for its complaint against Defendants Safeco Insurance Company of Illinois ("Safeco Illinois"), Safeco Insurance Company of America ("Safeco America"), Safeco Corporation, Liberty Mutual Insurance Company, Liberty Mutual Group Inc., The Ohio Casualty Insurance Company, and Open Seas Solutions, Inc. ("Open Seas") (collectively, the "Safeco Defendants"), alleges as follows:

1. This action arises under the Patent Laws of the United States, Title 35 of the United States Code (for example, 35 U.S.C. §§ 271, 281, 283, 284, and 285) for infringement of U.S. Patent No. 6,064,970 (the "'970 Patent") (attached as Exhibit A).

**PARTIES**

2. Progressive is a corporation organized under the laws of the state of Ohio, with its principal place of business at 6300 Wilson Mills Road, Mayfield Village, Ohio 44143.

3. Safeco Illinois is a corporation organized under the laws of the state of Colorado, with its principal place of business at 2800 West Higgins Road, Suite 1100, Hoffman Estates, IL 60195, and, on information and belief, is a wholly-owned subsidiary of Safeco Corporation.

4. Safeco America is a corporation organized under the laws of the state of Washington, with its principal place of business at Safeco Plaza, 1001 4th Avenue, Seattle, Washington 98185, and, on information and belief, is a wholly-owned subsidiary of Safeco Corporation.

5. Safeco Corporation is a corporation organized under the laws of the state of Washington, with its principal place of business at Safeco Plaza, 1001 4th Avenue, Seattle, Washington 98185, and, on information and belief, is majority-owned by Liberty Mutual Insurance Company through an indirect corporate relationship.

6. Liberty Mutual Insurance Company is a corporation organized under the laws of the state of Massachusetts, with its principal place of business at 175 Berkley Street, Boston, Massachusetts 02116, and, on information and belief, is a wholly-owned subsidiary of Liberty Mutual Group, Inc.

7. Liberty Mutual Group, Inc. is a corporation organized under the laws of the state of Massachusetts, with its principal place of business at 175 Berkley Street, Boston, Massachusetts 02116.

8. On information and belief, Safeco Illinois, Safeco America, Safeco Corporation, and Liberty Mutual Insurance Company are owned or controlled by or under common control

with Liberty Mutual Group, Inc. and operated collectively under the trade name "Safeco Insurance."

9. The Ohio Casualty Insurance Company, which operates under the registered trade name "Ohio Casualty," is a corporation organized under the laws of the state of Ohio, with its principal place of business at 136 North Third Street, Hamilton, Ohio, and, on information and belief, is majority-owned by Liberty Mutual Insurance Company through an indirect corporate relationship.

10. Open Seas Solutions, Inc. is a corporation organized under the laws of the state of Washington, with its principal place of business at 1191 2nd Avenue, Suite 600, Seattle, Washington 98101, and, on information and belief, is a subsidiary of Liberty Mutual Group, Inc.

#### **JURISDICTION AND VENUE**

11. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338.

12. Venue is proper in this Court under 28 U.S.C. §§ 1391(c) and 1400(b).

13. On information and belief, the Safeco Defendants individually and/or in concert, and through one or more agents acting under their control and direction, have committed and/or induced acts of infringement in this district, are subject to personal jurisdiction in this district, and therefore reside in this district.

14. On information and belief, one or more of the Safeco Defendants individually and/or in concert, and through one or more agents acting under their control and direction, have registered with the Ohio Department of Insurance and sell insurance within the state of Ohio.



**COUNT I**

**Patent Infringement – The Rewind Program**

15. Progressive incorporates by reference the allegations set forth in paragraphs 1 through 14 above as though fully asserted herein.

16. Progressive asserts this Count I for patent infringement against Safeco Illinois, Safeco America, Safeco Corporation, Liberty Mutual Insurance Company, and Liberty Mutual Group Inc. (collectively, the “Rewind Defendants”).

17. On May 16, 2000, the United States Patent and Trademark Office duly and legally issued U.S. Patent No. 6,064,970 (the “’970 Patent”) (attached as Exhibit A) for an invention related to the determination of insurance ratings based upon vehicle monitoring. Progressive owns the ’970 Patent.

18. On information and belief, one or more of the Rewind Defendants was notified of the ’970 Patent prior to the acts of infringement alleged herein and/or continued their acts of infringement after becoming aware of the ’970 Patent.

19. On information and belief, Safeco Illinois, individually and/or in concert with the other Rewind Defendants, or through one or more agents under their direction and control, has been and still is operating an incident forgiveness vehicle insurance program in the state of Ohio entitled “Rewind.” On information and belief, the Ohio Rewind insurance program is specifically targeted at the citizens of Ohio, including those residing in this district.

20. On information and belief, Safeco America, individually and/or in concert with the other Rewind Defendants, or through one or more agents under their direction and control, has been and still is operating an incident forgiveness vehicle insurance program in the state of Colorado entitled “Rewind.”

21. On information and belief, Safeco America, individually and/or in concert with the other Rewind Defendants, or through one or more agents under their direction and control, operates and maintains an Internet website at <http://www.rewindprogram.com>, which includes details regarding the Ohio and Colorado Rewind programs. The Internet website is accessible to residents of Ohio.

22. On information and belief, additional details regarding the Ohio Rewind program are available in registration documents Safeco Illinois submitted to the Ohio Department of Insurance, copies of which are included as Exhibit B hereto. These documents include copies of pages from the Rewind Internet website.

23. On information and belief, a third party vendor acting on behalf of and under the direction and control of one or more of the Rewind Defendants in connection with the Ohio and Colorado Rewind programs obtains data regarding location, milcage, speed, acceleration, VIN, and date/time from an insured vehicle's onboard computers and GPS via an electronic device plugged into the vehicle's OBD-II port. On information and belief, the Rewind Defendants own the electronic device.

24. On information and belief, the third party vendor, acting on behalf of and under the direction and control of one or more of the Rewind Defendants, calculates a driving safety score based on the obtained data in accordance with a scoring formula created by the Rewind Defendants.

25. Each of the Rewind Defendants is infringing the '970 patent, including through the operation of the Ohio and Colorado Rewind programs, which include each and every feature of the claimed invention. The Rewind Defendants are infringing either directly, through their own actions and/or the actions of one or more third-party vendors acting under their direction

and/or control, or indirectly, through active inducement of the infringing actions with knowledge of or deliberate indifference to the existence and infringement of the '970 Patent.

26. On information and belief, the Rewind Defendants have continued and still continue their infringing activities despite receiving notice of the '970 Patent, and such infringement is willful, entitling Progressive to the recovery of treble damages pursuant to 35 U.S.C. § 284. In addition, this is an exceptional case, justifying an award of attorneys' fees and costs to Progressive pursuant to 35 U.S.C. § 285.

27. The Rewind Defendants' infringement has caused and will continue to cause damage and irreparable harm to Progressive until enjoined by this Court. The amount of the damage and harm has not yet been determined but will be proven at trial.

## **COUNT II**

### **Patent Infringement – The Onboard Advisor Program**

28. Progressive incorporates by reference the allegations set forth in paragraphs 1 through 27 above as though fully asserted herein.

29. Progressive asserts this Count II for patent infringement against The Ohio Casualty Insurance Company, Safeco America, Liberty Mutual Insurance Company, Liberty Mutual Group, Inc., and Open Scas Solutions, Inc. (collectively, the "Onboard Advisor Defendants").

30. On information and belief, one or more of the Onboard Advisor Defendants was notified of the '970 Patent prior to the acts of infringement alleged herein and/or continued their acts of infringement after becoming aware of the '970 Patent.

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V.

**Defendant**

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31. On information and belief, The Ohio Casualty Insurance Company, individually and/or in concert with the other Onboard Advisor Defendants, or through one or more agents under their direction and control, has been and still is operating a commercial vehicle insurance program including a feature known as the "Onboard Advisor Insurance Advisor." On information and belief, the Onboard Advisor Insurance Advisor is specifically targeted at the citizens of Ohio, including those residing in this district.

32. On information and belief, Open Seas, individually and/or in concert with the other Onboard Advisor Defendants, or through one or more agents under their direction and control, operates and maintains an Internet website at <http://www.onboardadvisor.com>, which includes details regarding the Onboard Advisor Insurance Advisor. The Internet website is accessible to residents of Ohio.

33. On information and belief, additional details regarding the Onboard Advisor Insurance Advisor are available in registration documents Safeco America submitted to the Ohio Department of Insurance and the Washington State Office of the Insurance Commissioner, copies of which are included respectively as Exhibits C and D hereto.

34. On information and belief, Open Seas, acting on behalf of and under the direction and control of one or more of the other Onboard Advisor Defendants in connection with the Onboard Advisor Insurance Advisor, obtains data regarding location, mileage, speed, acceleration, and date/time from an insured vehicle's onboard computers and GPS via an electronic device installed in the vehicle.

35. On information and belief, Open Seas, acting on behalf of and under the direction and control of one or more of the other Onboard Advisor Defendants, calculates a driving safety score based on the obtained data.

36. Each of the Onboard Advisor Defendants is infringing the '970 patent, including through the operation of the Onboard Advisor Insurance Advisor, which includes each and every feature of the claimed invention. The Onboard Advisor Defendants are infringing either directly, through their own actions and/or the actions of one or more parties acting under their direction and/or control, or indirectly, through active inducement of the infringing actions with knowledge of or deliberate indifference to the existence and infringement of the '970 Patent.

37. On information and belief, the Onboard Advisor Defendants have continued and still continue their infringing activities despite receiving notice of the '970 Patent, and such infringement is willful, entitling Progressive to the recovery of treble damages pursuant to 35 U.S.C. § 284. In addition, this is an exceptional case, justifying an award of attorneys' fees and costs to Progressive pursuant to 35 U.S.C. § 285.

38. The Onboard Advisor Defendants' infringement has caused and will continue to cause damage and irreparable harm to Progressive until enjoined by this Court. The amount of the damage and harm has not yet been determined but will be proven at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Progressive demands the following relief:

- A. a preliminary and permanent injunction against the Safeco Defendants' continued infringement and inducement of infringement of the '970 Patent;
- B. an award of damages in favor of Progressive and against the Safeco Defendants sufficient to compensate Progressive for the Safeco Defendants' infringement of the '970 Patent and an assessment of pre-judgment interest and post-judgment interest;
- C. trebling of damages for willful infringement pursuant to 35 U.S.C. § 284;
- D. a finding by the Court that this case is exceptional under 35 U.S.C. § 285;
- E. an award to Progressive for its reasonable expenses, including attorneys' fees, and costs of this action; and
- F. such other relief as the Court finds just and proper.

**JURY DEMAND**

Progressive demands a jury trial.

Date: June 17, 2010

Respectfully submitted,

By: /s/ James R. Wooley

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Progressive Casualty Insurance Co.,	)	CASE NO. 1:10 CV 1370
	)	
Plaintiff,	)	JUDGE PATRICIA A. GAUGHAN
	)	
Vs.	)	
	)	
Safeco Insurance Co., et al.,	)	<u>Memorandum of Opinion and Order</u>
	)	
Defendants.	)	

**INTRODUCTION**

This matter is before the Court upon defendants' Motion to Stay Litigation Pending *Ex Parte* Reexamination of the Patent-In-Suit by the United States PTO (Doc. 44). This is a patent infringement dispute. For the reasons that follow, defendants' motion is GRANTED.

**FACTS**

Plaintiff, Progressive Casualty Insurance Company, brings this action against defendants, Safeco Insurance Company of Illinois, Safeco Insurance Company of America, Safeco Corporation, Liberty Mutual Insurance Company, Liberty Mutual Group, Inc., The Ohio Casualty Insurance Company, and Open Seas Solutions, Inc. (hereinafter collectively

"defendants"), alleging that defendants are infringing plaintiff's patent, U.S. Patent No. 6,064,970 (hereinafter "patent").

The facts of this case are set forth more fully in the Court's Memorandum of Opinion and Order denying defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted (Doc. 48). On September 22, 2010, defendants filed a petition for an *ex parte* reexamination of the patent with the United States Patent and Trademark Office (hereinafter "PTO"). Defendants now move to stay the litigation until the reexamination, if granted, is complete. Plaintiff opposes the motion.

### **LAW AND ANALYSIS**

A district court has the power to stay litigation pending the outcome of patent reexamination proceedings through the inherent power to manage its own docket. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988). Courts weigh three factors in determining whether to grant such a stay: "(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set." *01 Communique Lab., Inc. v. Citrix Sys.*, No. 06CV0253, 2008 U.S. Dist. LEXIS 19241, at \*4 (N.D. Ohio March 12, 2008) (citing *Xerox Corp. v. 3Com Corp.*, 69 F. Supp. 2d 404, 406 (W.D.N.Y. 1999)). Courts often also consider whether the party seeking the stay has done so in good faith or for the purposes of delay. *Id.*

#### **1. Prejudice**

Defendants argue that plaintiff will not be prejudiced by the stay because plaintiff waited 31 months to bring suit after it originally contacted defendant Safeco about possible

infringement of the patent. Defendants further argue that reexamination will occur in a relatively short period of time and that plaintiff has some degree of control over the length of time, as plaintiff can choose to participate in a PTO pilot program in which patent owners forego an owner's statement and plaintiff can choose to respond to inquiries from the PTO promptly. Defendants also argue that plaintiff has demonstrated that it will not be prejudiced during the delay caused by reexamination because it did not seek a preliminary injunction and because it offered to license its technology to defendant Liberty Mutual, indicating that money damages are sufficient to compensate plaintiff for any infringement.

Plaintiff responds that it will be prejudiced by a stay because defendants will be free to expand their infringing products and will gain market share in the usage-based insurance market in violation of plaintiff's right to exclude others from using its invention. Plaintiff also claims its reputation will be damaged as a leader in the field of usage-based insurance. Plaintiff argues that this type of harm is irreparable and compensable only by a permanent injunction. Plaintiff further claims that it did not engage in delay because it was not clear that defendants were offering any infringing products until late 2009, when it became aware of defendant Liberty Mutual's Onboard Advisor program and offered Liberty Mutual a license. It was not until February of 2010 that it became aware that Safeco was offering its Rewind program in direct competition with plaintiff. Plaintiff argues that if defendants' request for a stay is granted, defendants will effectively be able to avoid a permanent injunction if they are found to have infringed plaintiff's patent. In support, plaintiff points out that the patent expires in a little over five years, the average length of time for reexamination is over 25 months as of June 2010, and the litigation will not begin in earnest until after the reexamination. Plaintiff also notes that the

PTO received about the same number of reexamination requests in the first six months of 2010 as it did in the entire year of 2009, making it likely that the reexamination process will be significantly longer than 25 months. Plaintiff also argues that in addition to irreparable economic harm, evidence may be lost as memories fade, witnesses move on, and documents are lost in the shuffle, which would prejudice plaintiff on issues like willful infringement.<sup>1</sup> Finally, plaintiff argues that defendants are deliberately seeking to delay the litigation. In support, plaintiff argues that defendants have known about plaintiff's patent for several years and willfully ignored it. Had defendants believed the patent was invalid, they could have filed a reexamination request as early as 2007.

Defendants reply that plaintiff has not shown prejudice. Plaintiff has not explained how any additional delay during a stay for reexamination makes injunctive relief more urgent than it was when the case was filed. Defendants further argue that any harm from postponing a permanent injunction is compensable by money damages. Defendants reject plaintiff's claim that the patent broadly covers the usage-based insurance industry, and that plaintiff would thus be harmed by loss of market share, pointing out that Liberty Mutual's usage-based insurance program does not compute an insurance rating for the monitored period, as specified in the patent. Defendants argue that the patent system is designed to compensate patent holders for delays in recovering damages, including diverted sales, price erosion, increased expenditures caused by infringement, and prejudgment interest, and that plaintiff must show harm beyond this to show undue prejudice.

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<sup>1</sup> Plaintiff suggests that if the Court grants a stay of claim construction, the Court should permit discovery to continue so that such evidence is preserved for trial.

Upon review, the Court finds that plaintiff has not demonstrated undue prejudice. Delay due to the reexamination process is not itself a reason to find prejudice against plaintiff. *See Allied Erecting and Dismantling Co., Inc., v. Genesis Equip. and Mfrg., Inc.*, No. 4:08CV589, 2010 U.S. Dist. LEXIS 92851, at \*6-7 (N.D. Ohio Aug. 16, 2010) (“While some prejudice to Plaintiffs is inherent in any delay, this alone is not sufficient to prevent a stay. If it were, few if any patent cases would be stayed pending reexamination by the PTO.”). Additionally, the Court finds that neither party has engaged in deliberate delay tactics— plaintiff could not reasonably be expected to file a lawsuit at the first moment it suspects its patent might be implicated in a competitor’s product, especially without the investigation and actual knowledge to support such a claim. Similarly, defendants could not reasonably be expected to ask the PTO to reexamine a patent that is not being unequivocally asserted against them. While plaintiff also complains that evidence may be lost due to the delay, plaintiff gives no reason why it is more likely to occur in this case than in any other case. *See id.* at \*7.

Plaintiff argues that it will suffer irreparable harm during the delay caused by the reexamination due to defendants’ direct competition, increasing market share, and plaintiff’s inability to exclude defendants from using the patented invention, but the reality is that proceeding with the litigation would not avoid this harm as defendants would presumably continue to develop and promote their usage-based insurance products throughout the litigation. If plaintiff prevails, plaintiff could enforce its permanent injunction against defendants perhaps somewhat sooner than if a stay were not granted, but would be limited to money damages for the period of time between when the suit was filed and its resolution. Litigation itself is typically lengthy and involves unforeseen delays. Additionally, the reexamination may streamline the

issues to an extent that the litigation itself is shortened. Accordingly, plaintiff has not shown undue prejudice, which weighs in favor of granting a stay.

## **2. Simplification of Issues**

Defendants argue that a stay would simplify the issues in the case. Defendants argue that in the majority of *ex parte* reexaminations, the PTO changes or modifies claims, and if entire claims are canceled, the litigation will be greatly simplified. Defendants also argue that even if claim language is only changed, a stay would be beneficial because the parties would not waste resources on claim language that ends up being moot. Finally, defendants argue that even if the patent emerges unchanged from the reexamination, the litigation would be streamlined because the dialogue between the PTO and plaintiff will focus the issues and may eliminate or streamline issues of validity.

Plaintiff responds that a stay would not simplify the issues because the reexamination will likely not result in amendment or cancellation of the claims, given that the prior art references cited by defendants are cumulative of the prior art considered by the PTO prior to issuing the patent. Plaintiff argues that the vast majority of patents emerge from reexamination with at least some valid claims, so it would be speculative at best to suggest that an *ex parte* reexamination would simplify the issues. Plaintiff also argues that only a fraction of the issues that defendants are likely to raise in litigation can be addressed upon reexamination, which should weigh against a stay. Plaintiff points out that pursuant to 35 U.S.C. §§ 301 and 311(b)(2), reexamination can only consider invalidity under 35 U.S.C. §§ 102 and 103 based on prior patents and printed publications, and cannot consider invalidity under 35 U.S.C. §§ 101 or 112, nor can a reexamination address assertions that a patent is unenforceable or not infringed.

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Plaintiff also argues that issues will not be simplified because defendants are not bound by the results of the reexamination—defendants will be able to raise the exact same invalidity arguments in the litigation even if the PTO rejects them in reexamination. Finally, plaintiff argues that postponing claim construction will not serve the interests of justice or efficiency because any amendments to the claims are likely to involve language that is the same or similar to what is already in the claims, and limited supplemental claim construction, if necessary, can be dealt with before trial.

Defendants reply that a stay would promote judicial economy because the reexamination request focuses on the alleged point of novelty of the patent: determining the cost of insurance for the data collection period. Defendants argue that the prior art references they cite in the reexamination request each disclose determining insurance rates for the data collection period. Defendants also argue that even on the 25% chance that no claims are canceled or amended, the prosecution of the reexamination would create a record for claim construction and infringement analysis, given that the accused Rewind program uses driving data to waive a driving incident for a future insurance period, not the same data collection period as the patent claims.

Upon review, the Court finds that simplification of the issues weighs in favor of granting a stay. The reexamination data from the USPTO for 2010 shows that since the inception of *ex parte* reexaminations in 1981, over 90% of requests for *ex parte* reexaminations have been granted. Thus, it is likely the PTO will grant defendants' request for reexamination. Further, 77% of all patents which have been reexamined since 1981 have either had all claims canceled or changes made to the claims. Thus, it is also likely at least some of the patent's claims will be changed upon reexamination. Plaintiff is correct that defendants are not bound by the results of



the *ex parte* reexamination and that defendants' basis for reexamination constitutes only a fraction of the issues in this case. If claims are canceled or changed, however, it would simplify the issues pertaining to defendants' arguments on invalidity based on prior art. Even if all the claims are confirmed by the PTO, the record of reexamination is still likely to be entered at trial, reducing the length and complexity of the litigation. See *Nidec Corp. v. LG Innotek Co., Ltd.*, No. 6:07cv108, 2009 WL 3673433, at \*2 (E.D. Tex. April 3, 2009). Additionally, if claims are canceled or changed, it may simplify the issues with respect to the invalidity arguments defendants raised in their Rule 12(b)(6) motion and will presumably assert during the litigation. Granting a stay will also avoid duplication of efforts by the Court should the claim language be changed.

### 3. Stage of the Case

Defendants argue that a stay is appropriate because litigation has just begun. Plaintiff argues that a stay is premature at this stage of the case because the PTO has not yet granted defendants' reexamination request.<sup>2</sup>

Upon review, the Court finds that this factor weighs heavily in favor of granting a stay, even prior to the PTO issuing its decision on whether to grant defendants' reexamination request. This case is in a very early stage, and discovery has barely begun. While the PTO has not yet granted defendants' request, it will decide whether to reexamine the patent by December 22,

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<sup>2</sup> Plaintiff also argues that without an answer to the complaint, the Court cannot conclude that the issues raised in the reexamination request are substantially identical to the issues in the litigation. Plaintiff cites no case holding that issues in a reexamination request must be substantially identical to issues in the litigation before a court should grant a stay.

2010. Should the PTO decide to deny the request, the delay of several weeks will be insignificant to the course of this case. Moreover, the Court finds that because the case is at such an early stage, a stay of the entire case, including discovery and claim construction, is appropriate.

Accordingly, given that the plaintiff has not shown undue prejudice, that the reexamination will likely simplify the issues for litigation, and that the case is at a very early stage, defendants' motion is granted.

**CONCLUSION**

For the reasons set forth above, defendants' Motion to Stay Litigation Pending *Ex Parte* Reexamination of the Patent-In-Suit by the United States PTO is GRANTED. This case will be closed, but reopened upon immediate notification of either party after the conclusion of the reexamination process.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan  
PATRICIA A. GAUGHAN  
United States District Judge

Dated: 11/12/10

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Date Filed	#	Docket Text
06/18/2010	<u>1</u>	<b>Complaint</b> with jury demand against All Defendants. Filing fee paid \$ 350, Receipt number 0647-4148235. Filed by Progressive Casualty Insurance Company. (Attachments: # <u>1</u> Exhibit A, US Patent No. 6064970, # <u>2</u> Exhibit B, Ohio Rewind Program, # <u>3</u> Exhibit C, Onboard Advisor Ohio Filing, # <u>4</u> Exhibit Onboard Advisor Washington Filing, # <u>5</u> Civil Cover Sheet) (Wooley, James) (Entered: 06/18/2010)
06/18/2010	<u>2</u>	Corporate Disclosure Statement identifying Corporate Parent The Progressive Corporation for Progressive Casualty Insurance Company filed by Progressive Casualty Insurance Company. (Wooley, James) (Entered: 06/18/2010)
06/21/2010		Judge Kathleen M. O'Malley assigned to case. Recused pursuant to General Order No. 2009-3. (C,BA) (Entered: 06/21/2010)
06/21/2010		Judge Lesley Wells assigned to case. Judge Kathleen M. O'Malley terminated. (C,BA) (Entered: 06/21/2010)
06/21/2010		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge Vecchiarelli. (C,BA) (Entered: 06/21/2010)
06/21/2010	<u>3</u>	Magistrate Consent Form issued. No summons provided, no summons issued. (C,BA) (Entered: 06/21/2010)
06/21/2010		This action has been identified as a Patent Case that is subject to the Local Patent Rules. Link to <u>Local Patent Rules</u> . (C,BA) (Entered: 06/21/2010)
06/23/2010	<u>4</u>	<b>Order</b> of Recusal. This case is returned to the Clerk for reassignment. Judge Lesley Wells (C,KA) (Entered: 06/23/2010)
06/23/2010		Judge Patricia A. Gaughan assigned to case. Judge Lesley Wells terminated. (C,BA) (Entered: 06/23/2010)
06/23/2010	<u>5</u>	Pracipe for issuance of Original Summons to <i>all Defendants</i> filed by Progressive Casualty Insurance Company. Related document(s) <u>1</u> , <u>2</u> . (Attachments: # <u>1</u> Summons to Safeco Ins. Co. of Illinois, # <u>2</u> Summons to

		Safeco Ins. Co. of America, # 3 Summons to Safeco Corp., # 4 Summons to Liberty Mutual Ins. Co., # 5 Summons to Liberty Mutual Group Inc., # 6 Summons to Ohio Casualty Ins. Co., # 7 Summons to Open Seas Solutions, Inc.)(Wooley, James) (Entered: 06/23/2010)
06/24/2010	6	Original Summons issued for service upon Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Insurance Company of America, Safeco Insurance Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Summons) (R,N) Modified text on 7/8/2010 (B,IE). (Entered: 06/24/2010)
07/01/2010	7	FILING ERROR, no summons attached. Praeipce for issuance of Original Summons <i>As Corrected</i> filed by Progressive Casualty Insurance Company. Related document(s) 1, 2. (Wooley, James) Modified to denote filing error on 7/6/2010 (B,IE) (Entered: 07/01/2010)
07/07/2010		Service by Clerk. Summons and Complaint addressed to Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Insurance Company of America, Safeco Insurance Company of Illinois & The Ohio Casualty Insurance Company placed in U.S. Mail. Type of service: certified mail. Receipt # 70071490000026718765/8819/8796/8802/8789/8772. (C,BA) (Entered: 07/07/2010)
07/07/2010	8	Praeipce for issuance of Original Summons <i>as corrected</i> filed by Progressive Casualty Insurance Company. Related document(s) 1, 2. (Attachments: # 1 Summons to Safeco Corporation)(Wooley, James) (Entered: 07/07/2010)
07/08/2010	9	Original Summons issued for service upon Safeco Corporation. (B,IE) (Entered: 07/08/2010)
07/08/2010		Service by Clerk. Summons and Complaint addressed to Safeco Corporation placed in U.S. Mail. Type of service: certified mail. Receipt # 70071490000026718826. (C,BA) (Entered: 07/08/2010)
07/08/2010	10	<b>Case Management Conference Scheduling Order</b> with case management conference set on 8/20/2010 at 9:00 a.m. to be held telephonically before Hon. Patricia A. Gaughan. Signed by Judge Patricia A. Gaughan on 7/08/10. (D,MB) (Entered: 07/08/2010)
07/12/2010	11	Return of Service by Clerk executed upon Liberty Mutual Insurance Company and Open Seas Solutions, Inc. by certified mail on 7/9/2010, filed on behalf of Plaintiff. Related document(s) 1. (B,B) (Entered: 07/12/2010)
07/13/2010	12	Attorney Appearance by Christopher J. Higgins filed by on behalf of Progressive Casualty Insurance Company. (Higgins, Christopher) (Entered: 07/13/2010)
07/14/2010	13	<b>Motion</b> for attorney Laura Beth Miller to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-4186103, filed by Plaintiff Progressive

		Casualty Insurance Company. (Attachments: # <u>1</u> Affidavit of Laura Beth Miller)(Wooley, James) (Entered: 07/14/2010)
07/14/2010	<u>14</u>	<b>Motion</b> for attorney Ralph J. Gabric to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-4186121, filed by Plaintiff Progressive Casualty Insurance Company. (Attachments: # <u>1</u> Affidavit of Ralph J. Gabric) (Wooley, James) (Entered: 07/14/2010)
07/14/2010	<u>15</u>	<b>Motion</b> for attorney Jacob C. Bachman to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-4186139, filed by Plaintiff Progressive Casualty Insurance Company. (Attachments: # <u>1</u> Affidavit of Jacob C. Bachman)(Wooley, James) (Entered: 07/14/2010)
07/14/2010	<u>16</u>	<i>Notice Of Filing Report On The Filing Or Determination Of An Action Regarding A Patent Or Trademark</i> filed by Progressive Casualty Insurance Company. (Attachments: # <u>1</u> Report On The Filing Or Determination Of An Action Regarding A Patent Or Trademark)Related document(s) <u>1</u> . (Wooley, James) (Entered: 07/14/2010)
07/15/2010	<u>17</u>	Return of Service by Clerk executed upon Safeco Insurance Company of Illinois by certified mail on 7/12/2010, filed on behalf of Plaintiff. Related document(s) <u>1</u> . (B,B) (Entered: 07/15/2010)
07/15/2010		(Court only) Staff Note Regarding Pro Hac Vice Motion from attorney Laura Beth Miller. The attorney's bar status was verified active. Related document(s) <u>13</u> . (G.C.A) (Entered: 07/15/2010)
07/15/2010		(Court only) Staff Note Regarding Pro Hac Vice Motion from attorney Ralph J. Gabric. The attorney's bar status was verified active. Related document(s) <u>14</u> . (G.C.A) (Entered: 07/15/2010)
07/15/2010		(Court only) Staff Note Regarding Pro Hac Vice Motion from attorney Jacob C. Bachman. The attorney's bar status was verified active. Related document(s) <u>15</u> . (G.C.A) (Entered: 07/15/2010)
07/15/2010	<u>18</u>	Return of Service by Clerk executed upon Safeco Insurance Company of America and Liberty Mutual Insurance Company by certified mail on 7/12/2010 filed on behalf of Plaintiff. Related document(s) <u>1</u> . (B,B) (Entered: 07/15/2010)
07/15/2010	<u>19</u>	Return of Service by Clerk by certified mail executed upon Liberty Mutual Group Inc., no date of service indicated on green card, filed on behalf of Plaintiff. Related document(s) <u>1</u> . (B,B) (Entered: 07/15/2010)
07/19/2010		<b>Order</b> [non-document]granting Motion for appearance pro hac vice by attorney Laura B. Miller for Progressive Casualty Insurance Company (Related Doc # <u>13</u> ). Judge Patricia A. Gaughan on 7/19/2010.(S,J) (Entered: 07/19/2010)
07/19/2010		<b>Order</b> [non-document]granting Motion for appearance pro hac vice by attorney Ralph J. Gabric for Progressive Casualty Insurance Company (Related Doc # <u>14</u> ). Judge Patricia A. Gaughan on 7/19/2010.(S,J) (Entered: 07/19/2010)

07/19/2010		<b>Order</b> [non-document] granting Motion for appearance pro hac vice by attorney Jacob C. Bachman for Progressive Casualty Insurance Company (Related Doc # 15 ). Judge Patricia A. Gaughan on 7/19/2010.(S,J) (Entered: 07/19/2010)
07/20/2010	20	Return of Service by Clerk executed upon Safeco Corporation by certified mail on 7/14/2010, filed on behalf of Plaintiff. Related document(s) 1 . (B,B) (Entered: 07/20/2010)
07/23/2010	21	<b>Motion</b> for attorney Charles M. McMahon to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-4201928, filed by Plaintiff Progressive Casualty Insurance Company. (Attachments: # 1 Affidavit of Charles M. McMahon)(Wooley, James) (Entered: 07/23/2010)
07/26/2010	22	Attorney Appearance by John S. Cipolla of <i>Calfee, Halter &amp; Griswold LLP</i> filed by on behalf of All Defendants. (Cipolla, John) (Entered: 07/26/2010)
07/26/2010	23	Attorney Appearance by Mark W. McDougall of <i>Calfee, Halter &amp; Griswold LLP</i> filed by on behalf of All Defendants. (McDougall, Mark) (Entered: 07/26/2010)
07/27/2010		(Court only) Staff Note Regarding Pro Hac Vice Motion from attorney Charles M. McMahon. The attorney's bar status was verified active. Related document(s) 21 - (G.CA) (Entered: 07/27/2010)
07/27/2010	24	<b>Motion</b> for To Reschedule Date of Case Management Conference with Consent of Plaintiff filed by Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Corporation, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # 1 Proposed Order)(Cipolla, John) (Entered: 07/27/2010)
07/27/2010	25	Unopposed <b>Motion</b> for To Permit Counsel To Appear in Person at the Case Management Conference filed by Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Corporation, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # 1 Proposed Order)(Cipolla, John) (Entered: 07/27/2010)
07/27/2010	26	Unopposed <b>Motion</b> for extension of Time to Answer Complaint and Other Responsive Pleadings until September 8, 2010 filed by Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Corporation, Safeco Insurance Company of America, Safeco Insurance Company of Illinois, The Ohio Casualty Insurance Company. (Attachments: # 1 Proposed Order)(Cipolla, John) (Entered: 07/27/2010)
07/27/2010	27	Attorney Appearance by Joshua V. Vanhoven of <i>Ropes &amp; Gray LLP</i> filed by on behalf of All Defendants. (Vanhoven, Joshua) (Entered: 07/27/2010)
07/30/2010	28	<b>Motion</b> for attorney James R. Myers to Appear Pro Hac Vice. Filing fee \$ 100, receipt number 0647-4212234, filed by Liberty Mutual Group Inc., Liberty Mutual Insurance Company, Open Seas Solutions, Inc., Safeco Corporation, Safeco Insurance Company of America, Safeco Insurance